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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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ONE

The denial of the conscientious objector status by the appeal board has without basis in fact; consequently, the final I-A classification was arbitrary and capricious. 28-40

TWO

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OPINION BELOW

The opinion of the Court of Appeals is reported. (*United States* v. *Witmer*, 3rd Cir., May 13, 1954, 213 F. 2d 95) It appears in the record. [R. 61-62] A memorandum opinion of the district court also appears in the record. [R. 52-59] It is reported in 115 F. Supp. 19. See also the opinion by the Court of Appeals in the companion case in the court below, *United States* v. *Hagaman*, 3rd Cir., 1954, 213 F. 2d

86. It is referred to in the opinion in this case by the Court of Appeals and appears as an appendix to the petition for writ of certiorari in this case, page 37.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1954. [R. 62] The time for filing the petition for writ of certiorari was extended to June 30, 1954. The petition for writ of certiorari was filed within the extended time. The writ was granted on October 14, 1954. [R. 79] The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

STATUTE AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"*Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any hu-

man relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President

may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. § 462(a)) provides:

" . . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides in part:

"*Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but

for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces. . . ."

Section 1624.1(a) of the Selective Service Regulations (32 C. F. R. § 1624.1(a), E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control."

Section 1624.2 of the Selective Service Regulations (32 C. F. R. § 1624.2, E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Appearance before local board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).

"(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in de-

termining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

"(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

"(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."

Section 1624.3 of the Selective Service Regulations (32 C. F. R. § 1624.3, E. O. 10001, 13 F. R. 5488, Sept. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Induction Postponed.*—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in § 1624.2(d)."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948,

as amended by E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"*Special provisions when appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible

for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in paragraph (a) (2) or (4) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrants. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are

not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949)) provides:

"*Decision of appeal board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *Provided*, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

I.

Whether the denial of the claim for classification of petitioner as a conscientious objector by the appeal board was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny and whether the appeal board may deny the conscientious objector status because the petitioner, an objector to direct participation in the armed forces, is willing to work on a farm and produce food that might be held to be indirect participation in the war effort.

III.

Whether a local board can deny a full and fair hearing upon personal appearance through refusal to reopen and reclassify petitioner and then cure that deprivation of due process of law by merely giving notice of such illegal action.

STATEMENT OF THE CASE

This criminal action was started by indictment charging petitioner with violating the Selective Service Act of 1948, as amended, and the regulations thereunder, by failing to submit to induction. [R. 1, 3] The indictment charged that the petitioner refused to be inducted into the armed forces of the United States after having been properly classified and ordered to report for induction by his local board. [R. 1, 3] Petitioner was arraigned. He pleaded not guilty. [R. 1] There was a trial to the jury. [R. 1, 4] The case was called for trial on March 27, 1952, and was concluded on Monday, March 31, 1952. [R. 1, 4, 15] Evidence was received. [R. 4-16] The jury found petitioner guilty. [R. 1] The court heard argument on the motion for acquittal and took the case under advisement. [R. 1] An opinion was written and an order entered denying the motion. [R. 1, 52-59] The court sentenced petitioner to serve three years in the custody of the Attorney General. [R. 16] Notice of appeal was duly and timely filed. [R. 2] The court below affirmed. [R. 61-62]

Petitioner was born February 7, 1930. [R. 16] He registered with Local Board No. 28, Reading, Pennsylvania. [R. 16-17] On January 23, 1951, the local board mailed him a classification questionnaire (SSS Form No. 100). [R. 16] This was returned to the local board properly filled out on January 31, 1951. [R. 16] On page 7 of the questionnaire petitioner indicated that he had conscientious objections to combatant and noncombatant military service. He signed the statement requesting that the special form for conscientious objector be mailed to him. [R. 20]

In the classification questionnaire petitioner showed that he worked at a hat factory. [R. 20] He also showed that he operated his father's farm of 116 acres, 30 acres of which were under cultivation. [R. 19] He showed that he had completed eight years of elementary schooling. [R. 20]

The local board mailed to the petitioner a special form for conscientious objector (SSS Form No. 150) on January 31, 1951. [R. 21, 23] It was returned properly signed and filled out by the petitioner on February 5, 1951. [R. 23] Although Series I(B) of the form (page 1) was not signed, on page 4 of the form petitioner wrote as follows:

> "My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a Superior Being.
>
> [signed] Philip A. Witmer
>
> "for section I (B)
> "Page 1" [R. 27]

Under Series II of the special form for conscientious objector petitioner stated that he believed in a Supreme Being. He described the nature of his beliefs involving duties superior to those arising from any human relation by the following:

> "I am absolutely neutral toward the political disputes and the international controversies and combats of this world. I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation." [R. 24]

Petitioner showed the source of his training and belief supporting his claim by stating that he had been instructed by his parents in the study of the Bible and that at the age of eleven he himself began to study the Bible with the aid of the Watchtower publications. [R. 24] He stated in the form that he believed in the use of force only at the command of Almighty God. [R. 24] He further stated that he had demonstrated his convictions by the study of the Bible and by telling others about God's kingdom and "of how he will put a stop to all wars." [R. 24] He answered questions showing his general background, including schooling and employment. [R. 24-25] He showed that he was an active member of Jehovah's Witnesses and acknowledged the Watchtower Bible and Tract Society, Inc., of Brooklyn, New York, as the governing body of Jehovah's Witnesses. He stated that he had always been one of Jehovah's Witnesses. He gave references to the local meeting place and named the presiding minister, Richard Palms. Also, he attached to the special form for conscientious objector the February 1, 1951, issue of the *Watchtower* magazine (APPENDIX A to this brief) for a description of the official statement of Jehovah's Witnesses in relation to participation in war. He referred to this publication in his answers to Series IV 2(e). [R. 25-26]

Petitioner also gave references and signed a certificate that he had truthfully answered all the questions propounded in the form. [R. 26-27]

Petitioner was classified I-A (making him liable for unlimited military training and service) on February 21, 1951. [R. 21] On March 1, 1951, petitioner wrote a letter

requesting a personal appearance, in which he also requested an appeal. [R. 12-13, 27-28] The local board notified petitioner to appear before the board for a personal appearance on March 19, 1951. [R. 27]

At the trial in the court below a question was raised as to whether the request for personal appearance was within ten days as required by the regulations. The letter requesting personal appearance and appeal was written on March 1, 1951, and mailed on that date but not received by the board until March 5, 1951, which was more than ten days from the date of classification. The reason for the delay in receiving the letter was that the office of the board was not open on Saturday, March 3, and was closed on Sunday, March 4, as usual. The clerk found the letter at the office on arrival on March 5. [R. 11-12] Neither the trial court nor the local board held that the petitioner was too late in making the request. [R. 11, 53]

Petitioner appeared on March 19, 1951. [R. 4, 5, 9-10, 21, 33-34, 53-55] He submitted new information verbally and also filed with the board a letter and an affidavit. [R. 9, 28-29, 29-33, 54] The affidavit is by Richard B. Palms, the presiding minister of the local congregation of Jehovah's Witnesses. It vouches for the sincerity of the petitioner and his membership in the organization. [R. 9, 28-29, 53] A typewritten statement attached to the affidavit, consisting of three pages, explained why petitioner felt that he was a minister of religion and entitled to classification as such. [R. 9, 29-33, 53-54] The local board made a memorandum of what transpired upon the occasion of the personal appearance. It was dictated by the chairman of the board. [R. 7, 10, 33-34, 54-55] It reads as follows:

"March 19, 1951

"Re: Order #36-28-30-71 Philip Andrew Witmer

"The Board met with registrant today. The registrant informed the Board that he left his place of employment on March 3, where he had

worked for three years in a hat factory. The Board chairman immediately pointed out that he was classified as 1-A on February 21, which meant he left his position about two weeks later. He then mentioned that his father had a farm which had not been worked as a farm for 23 years but that he felt he was going to start getting this farm in shape. Prior to this time he stated he had gotten a few acres in shape for their own family use so that they would not be dependent upon other people.

"The registrant then pointed out that he was a minister of the Gospel and the only evidence he presented to substantiate this fact was some paraphernalia from the Watchtower Association of the Jehovah [sic] Witnesses. The registrant was asked if he was an ordained minister and he said Jehovah [sic] Witnesses became ordained when they started distributing their literature. The Board felt this was not sufficient evidence to warrant a 4-D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination." [R. 33-34, 54-55]

There was considerable interrogation by counsel and the court as to what transpired upon the occasion of the personal appearance. The undisputed evidence developed at the trial establishes that petitioner was told that because he had requested an appeal no action would be taken upon his case; the classification would not be changed; no new classification card would be mailed and the file would be forwarded to the appeal board. The board admittedly informed petitioner at the conclusion of the personal appearance that the case was out of their hands because he had appealed. [R. 4, 5, 6-7, 8, 10, 13]

The clerk of the local board testified that it was the policy of the board, when no new evidence was presented justifying a change of classification, not to notify the registrant by mailing a notice of classification and not to consider the classification anew, but automatically to send the file to the appeal board without further action. [R. 4, 5-7, 10]

Following the personal appearance the file was sent to the appeal board. On April 24, 1951, the appeal board determined that petitioner should not be classified as a conscientious objector, either to combatant or noncombatant military service. In the same order the appeal board, as required by statute, ordered the entire file forwarded to the Department of Justice for an investigation and report to the appeal board on the validity of petitioner's claim for classification as a conscientious objector. This action is not referred to in the testimony. It appears in the draft board file. [R. 21, 34-35, 55]

The report of the Federal Bureau of Investigation was that the grade school teacher informed that petitioner had a high character and thought that he was "a sincere objector." [R. 37] Members of petitioner's church reported that he was active in the work of Jehovah's Witnesses and believed "him to be sincere." [R. 37] The employer of petitioner reported that petitioner was "very religious and very sincere in his beliefs." [R. 37] A fellow employee remembered him as being a very aggressive talker on religion and that he had heard him say "long ago that it is wrong to go to war." [R. 37] Petitioner's neighbors reported that the character of petitioner was good and that they thought his conscientious objector stand was made sincerely. [R. 37]

The facts stated by the hearing officer were that petitioner was one of Jehovah's Witnesses and that he signed Series XIV in the classification questionnaire showing that he was conscientiously opposed to participation in war, combatant and noncombatant. He refers to Form 150, submitted by petitioner, where he took the position all Jehovah's Witnesses take, that they were neutral in their atti-

tude toward war by the worldly governments and their obligations to God were superior to any other obligation. [R. 37-38] The hearing officer stated [R. 38]:

> "...This position is a form of pacifism peculiar to this group. They say that they would fight at the Lord's command, but that there is now no such command to them. They say that the ancient Jews were justified in making war because Jehovah commanded them to. They claim to be ministers of the gospel and object to army service because it will interfere with their ministry. They usually refer also to the Christian obligation to love others and not to hate or harm them. The registrant says on this point: 'We believe in love and you are supposed to love everybody even your enemies.' This registrant's pacifism is based on all these considerations. His position is the same as that of many members of this group whom I heard during the war and who were classified 4E.
>
> "As to taking noncombatant service, he quotes his old school teacher who used to say, the boy who makes the snow balls is just as responsible as the boy who throws them....
>
> "The registrant is evidently a life-long and rather active Jehovah's Witness. His desire to be deferred on other grounds does not seem to me to invalidate his claim to be regarded as a conscientious objector. . . ."

The hearing officer recommended in favor of petitioner's claim for classification as a conscientious objector, reporting [R. 39]:

> "I recommend that the registrant be classified IV-E."

On October 18, 1951, A. Devitt Vanech, Deputy Attorney General, reviewed the file and the report of the hearing

officer. [R. 35-36] He rejected the recommendation of the hearing officer and recommended that petitioner's claim for exemption as a conscientious objector be not sutsained:

> "After consideration of the character and good faith of the objections of the registrant, the Department of Justice recommends to your Board that his claim for exemption from combatant and noncombatant training and service be not sustained.
>
> "You will note that this Department does not concur in the recommendation of the Hearing Officer. January 30, 1951, while employed in a hat factory, registrant wrote a letter to the local board, in which he states: 'It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.' In his letter to the local board dated March 1, 1951, registrant claims to be a minister of the Gospel. Registrant's inconsistent statements and his offer to contribute to the war effort are believed to be incompatible with a sincere conscientious objector claim." [R. 36]

The Deputy Attorney General added:

> "It is also noted that registrant did not sign series I (A) or (B) on SSS Form No. 150." [R. 36]

It should be observed that this comment by the Deputy Attorney General is without weight or moment in the consideration of the claim of petitioner as a conscientious objector, because, as stated at page 11, *supra,* although petitioner did not sign the printed statement on page 1 of the special form for conscientious objector (SSS Form No. 150), he wrote out and signed a statement on page 4 of the

special form that is identical to that appearing in the printed statement in Series I(B). [R. 27]

On November 6, 1951, petitioner was notified of a I-A classification by the appeal board. [R. 21] This is shown by the appeal record that appears in the draft board file. [R. 39]

Petitioner was mailed a notice to report for induction. [R. 21, 44] It was dated November 21, 1951. He was commanded to report and submit to induction on December 5, 1951. [R. 44]

Petitioner reported at the induction station but refused to submit to induction. [R. 48] He was taken out of the line-up and admonished if he did not submit to induction he would be prosecuted. He was offered noncombatant service in the armed forces as a conscientious objector, which he refused. He was again ordered to take one step forward when his name was called and he again refused to step forward and be inducted into the armed forces. [R. 49-50] The army officers reported from the induction station back to the local board that petitioner was a conscientious objector, that he was one of Jehovah's Witnesses and that because of conscience and religion he could not enter military service "even in a noncombat status." [R. 48, 49-50]

Witmer certified that he was a conscientious objector in his classification questionnaire. [R. 20] He filled out the conscientious objector form showing that he fit the definition of a conscientious objector. [R. 23-27] A ground for the motion for judgment of acquittal was that there was no basis in fact for the denial of the status. [R. 51-52] Both the trial court and the Court of Appeals held that there was basis in fact. [R. 52-54, 55-58, 61-62]

The hearing officer of the Department of Justice found that Witmer was sincere and possessed the necessary qualifications for classification as a conscientious objector. [R. 36-39] The Department of Justice recommended that petitioner be denied the conscientious objector status because

of his willingness to assist in the war effort by farming. [R. 35-36] In the motion for judgment of acquittal it was contended that there was no basis in fact for the denial of the conscientious objector status. [R. 51-52] The district court and also the Court of Appeals held that willingness to assist in the war effort by farming was sufficient basis for the denial of the conscientious objector status. [R. 55, 58-61]

The undisputed evidence showed that upon the occasion of the personal appearance the local board failed to reopen the case of petitioner and reclassify Witmer as required by Section 1624.2(c) of the Selective Service Regulations. The record also showed that the board, on personal appearance, considered the case to be out of its hands. [R. 4-10, 13, 21, 28-34, 53-55] Several grounds of the motion for judgment of acquittal complained of the denial of procedural due process of law on personal appearance. [R. 51] The trial court and the Court of Appeals held that there was no denial of procedural due process of law. [R. 56-59, 62] See also *United States* v. *Hagaman,* 3rd Cir., 1954, 213 F. 2d 86, which opinion in the companion case in the court below appears as an appendix to the petition for writ of certiorari in this case, page 37.

SUMMARY OF THE ARGUMENT

ONE

The denial of the conscientious objector status by the appeal board was without basis in fact; consequently, the final I-A classification was arbitrary and capricious.

The undisputed documentary proof showed that Witmer came within the definition of conscientious objector in the act. It showed his belief in the Supreme Being, his objection to military service, his religious training and belief as one of Jehovah's Witnesses and that his objections did not come from political, sociological or philosophical grounds. The draft board file contains two articles on the conscientious

objections of Jehovah's Witnesses. These appear in the *Watchtower* magazine of February 1, 1951. One is entitled "Why Jehovah's Witnesses Are Not Pacifists." The other is entitled "Pacifism and Conscientious Objection—Is There a Difference?" (This magazine is APPENDIX A to this brief.) These articles are summarized in the main part of this argument under this point, *infra,* pp. 29-32.

The proof showed that Witmer, as one of Jehovah's Witnesses, is separate and apart from this world. He relied on the statement of Jesus that Christians are no part of this world. (John 17:14) His citizenship is in heaven. (Philippians 3:20) He believed in the commandment of the apostle not to entangle himself with the affairs of this life. (2 Timothy 2:3, 4) The weapons of warfare that petitioner is authorized to use are limited to words, oral and printed. He is authorized to fight for the faith, using the sword of the spirit, which is the Word of God. (Ephesians 6:17) He is forbidden to use the weapons of warfare of this world. He declared that he cannot desert the Lord's army to do service in the armies of this world.

Witmer believes in self-defense, but this does not mean that he is authorized to engage in service in the armed forces. He maintains a position of strict neutrality. It should be remembered that neither Jesus nor the early Christians enrolled in the Roman armies. They refused to do military service and were persecuted.

In situations where there is no contradiction of the documentary evidence, as here, the courts have held in conscientious objector cases that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399, (1954), applies. (*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369, 371; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Wilson,* 7th Cir.,

1954, 215 F. 2d 443, 445, 446) These cases are not to be distinguished because of the rejection of the various speculations urged as basis in fact. The documentary evidence in each case showed the same facts as those established in this case.

The failure of Witmer to sign the conscientious objector blank is immaterial. Local Board Memorandum No. 41 authorized the preparation of his own statement containing the same language that appears in Series I(B) of the conscientious objector form.

That Witmer may have changed his claims for classification three times during the history of his case before the board does not give basis in fact for the denial of the conscientious objector claim. Section 1625.1(b) of the Selective Service Regulations required him to state all facts that would justify different classification. The giving of information and the making of three claims at one time or consecutively may not be relied on as basis for the denial of the conscientious objector status. Witmer was not inconsistent in making his several claims before the board. —*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331.

TWO

The act and regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that willingness to work on a farm and produce food to assist in the war effort is basis in fact for the denial of the conscientious objector status.

Section 6(j) provides for the recommendation of the Department of Justice. This is implemented by Section 1626.25 of the regulations. These make the recommendation a vital link in the chain of administrative proceedings. It is necessary that the Department of Justice proceedings be in accordance with law; otherwise the draft board proceedings are void.

In Section 6(j) of the act Congress did not confine conscientious objections to war in any form but extended

them to direct participation in the armed forces. Nothing can be found in the act that indicates that performance of civilian work that indirectly contributes to the war effort is basis in fact for the denial of the conscientious objector claim. Congress did not intend to allow reliance upon willingness to participate indirectly in war by performance of civilian work as a basis for the denial of the conscientious objector claim. The performance of civilian work by a conscientious objector to military service is not basis in fact for the denial of the claim for exemption.—*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d — ; *Franks* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d — ; *Goetz* v. *United States,* 9th Cir., Oct. 14, 1954, — F, 2d — .

The interpretation of the statute to allow the forfeiture of Witmer's claim for conscientious objection because of his willingness to help in the war effort by farming is unreasonable. A proper interpretation of the act should limit consideration to his willingness to participate in military training and service directly. If the statute is not interpreted to limit consideration of the type of service to direct participation in the armed forces and allow the board to consider indirect participation by civilian work, then it will be impossible for a conscientious objector to do anything. In time of war every civilian activity is indirectly a participation in the war effort. The interpretation by the court below completely nullifies the exemption extended to conscientious objectors because of willingness to perform civilian work contributing to the war effort. This interpretation is judicial legislation that flies in the face of the act. The construction is subversive of the intent of Congress.

Congress was dealing only with the problem of raising an army. It was not interested in the type of work performed by persons that it exempted from training and service as soldiers. The nearer the participation in the war effort by civilians outside, the better it was for the nation, Congress considered. Deferments were granted to per-

sons to participate in essential work either directly or indirectly contributing to the war effort. Farmers were exempted because of their contribution to the war effort. So were men engaged in other necessary services, such as defense work or work in the merchant marine. There is absolutely nothing in the statute or the regulations that says that a conscientious objector cannot perform essential work contributing to the national defense or the war effort as a civilian employee. It is only when the conscientious objector is willing to perform combatant or noncombatant service that he can be denied his claim for classification.

Congress provided that conscientious objectors be required to perform civilian work contributing to the national safety and welfare. There is nothing in the act that forbids the Government from requiring conscientious objectors to work in defense plants or perform services connected with the war effort. Since a conscientious objector can be ordered to do defense work or perform services in a war plant, how can it be said that his willingness to perform such services without being ordered to do so is basis in fact for his denial of the claim for exemption?

His sincerity is not questioned even if he is willing to go into the armed services and do hospital work. He may wear a uniform and still no one will challenge his good faith. If a conscientious objector can wear a uniform and do hospital work in the army and still be entitled to claim his conscientious objections, then how can it be said that the performance of civilian work is basis in fact for the denial of the conscientious objector status?

The interpretation placed upon the act by the court below is inconsistent with the act itself. Congress rejected the specious position of the Government for the reasons stated by this Court in *Girouard* v. *United States*, 328 U. S. 61, 68, 69 (1946).

Congress did not extend conscientious objections to objection to war in any form. Congress limited the objection to direct performance of military service. Nothing is said

in the act that either directly or indirectly limits the type of civilian work a conscientious objector is willing to perform. The interpretation of the court below puts a vague and indefinite dragnet upon the statute. It places an illegal, never-ending and uncontrollable scope of inquiry never contemplated by the act.

The provision for the recommendation by the Department of Justice and the consideration thereof by the appeal board makes the procedure a vital link in the chain of administrative proceedings. The recommendation must be in accordance with law. When the court below approved the irrelevant and immaterial recommendation by the Department of Justice (because Witmer was willing to assist in the war effort by farming) and the appeal board acted upon it, illegal and fictitious standards were employed to defeat the valid claim of Witmer. Fictitious and illegal standards incorporated into the draft board proceedings destroy the classification.—*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d — ; *Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d —.

That Witmer was willing to do work on a farm does not in any way provide basis in fact for the denial of the conscientious objector status. The position of the court below is contrary to that of President Lincoln on this question.—See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 42-43, Washington, Government Printing Office, 1950.

That Witmer was willing to assist in the war effort to the extent of farming is wholly irrelevant and immaterial. —*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *Goetz* v. *United States,* 9th Cir., Oct., 14, 1954, — F. 2d —; *Franks* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d —.

If extended to its logical extreme the interpretation placed upon the act by the court below would require a conscientious objector to refuse to pay his income taxes or any other taxes that indirectly contribute to the war

effort of the nation. The interpretation requires the conscientious objector to do nothing in time of war. He is required to go on a sit-down strike. In fact he is banned by law from the performance of any sort of work that indirectly contributes to the defense effort of the nation. Such unreasonable interpretation of the statute should be rejected and condemned in this case.

THREE

The local board deprived petitioner of his rights guaranteed by Section 1624.2 of the Selective Service Regulations by considering the case as out of its hands and by refusing to reopen the case and reclassify petitioner upon his personal appearance.

Petitioner was told by the local board that because he had appealed his case no action would be taken on his request for reclassification at his personal appearance. The undisputed evidence shows that it was the policy of the board never to reopen and reclassify (as required by the regulations) on personal appearance when there was no new evidence presented. This policy is contrary to *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455. It denied the plain mandate of Section 1624.2(b) and (c) of the regulations.

The limitation of the scope of review (*Estep* v. *United States,* 327 U. S. 114, 121-122 (1946)) requires that the court insist on a strict compliance with the requirements of procedural due process fixed by the regulations. (*N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446) The draft boards must strictly comply with the procedural mandate of the regulations.—*Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

Martin v. *United States,* 4th Cir., 1951, 190 F. 2d 775 (certiorari denied 342 U. S. 872 (1951)), is distinguished from

this case as it is from *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455. This case is the same as *United States* v. *Stiles, supra.* In the *Martin* case there was a reopening of the case and a reclassification. In the *Stiles* case and in this case there was no reopening of the classification. The local board did not consider the case *de novo.*

The local board on personal appearance considered only the ministerial claim for exemption without a reopening. Nowhere did the board pass upon the claim for classification as a farmer or upon the conscientious objector claim. There was no reclassification. The board merely declared that there was no new evidence warranting the granting of the minister's exemption. This did not spell out a consideration of the conscientious objector classification or the farmer's deferred status.

The giving of notice of the illegal action by the local board does not cure the refusal to reopen. The refusal to reopen was illegal action. Notice of unlawful action (failure to reconsider) did not make the case the same as that of *Martin, supra,* where there was a reopening and a reclassification. In the *Martin* case, *supra,* there was actual notice orally given of lawful procedure taken by the local board. Here there was actual notice given of unlawful action taken by the local board. The board told Witmer that his case was out of its hands because he had taken an appeal. This illegal action is contrary to *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90; compare *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 445.

The oral testimony relied on by the Government cannot be used to impeach the draft board memorandum made upon personal appearance that the board refused to reopen and reconsider the case. This evidence is incompetent. (*United States* v. *Hufford*, M. D. Pa., 1952, 103 F. Supp. 859, 862) Failure to consider the conscientious objector claim on personal appearance was a violation of the regulations.—32 C. F. R. § 1624.2(c); *Knox* v. *United States*, 9th Cir., 1952, 200 F. 2d 398, 401-402.

The regulations required the local board to give a notice of reclassification. Notice that the local board refused to reopen and reconsider the case on personal appearance is not equivalent to the statutory following personal appearance, requiring a new classification. (See *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455, 458-459; *United States* v. *Graham*, N. D. N. Y., 1952, 108 F. Supp. 794, 796-797.) The local board had no authority to issue the order to report for induction until the notice following reopening on personal appearance was given.

Witmer's filing of a dual request for personal appearance and for an appeal was proper. This does not justify the action of the board in considering the case to be out of its hands.—Local Board Memorandum No. 53, Selective Service System, January 14, 1953.

The failure to give written notice is not harmless error. It is grievous and fundamental. It was a complete omission to follow statutory steps required by the Selective Service Regulations. (*United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Strebel*, D. Kans., 1952, 103 F. Supp. 628; *United States* v. *Graham*, N. D. N. Y., 1952, 108 F. Supp. 794) The regulations that were in force at the time of the personal appearance required a *de novo* consideration of the case and a reclassification. These regulations were changed on September 25, 1951, after the date of the personal appearance of the petitioner in this case.

Regardless of whether error was committed in failing to comply with the statutory requirements of Section 1624.2(b) of the regulations by reopening and reconsidering the case, it nevertheless remains a fundamental violation of procedural due process. It is that the local board refused to consider petitioner's entire case on personal appearance. He was denied a full and fair hearing. The board rejected his evidence. It refused to exercise any responsibility whatever on personal appearance. When the board considered that his case was out of its hands because he had taken an appeal the board refused to consider the evidence at the personal ap-

pearance. This was equivalent to a denial of personal appearance. (*Morgan* v *United States,* 298 U. S. 468, 480-481 (1936); *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 93; *United States* v. *Romano,* S. D. N. Y., 1952, 103 F. Supp. 597; *United States* v. *Peterson,* N. D. Cal. S. D., 1944, 53 F. Supp. 760; *United States* v. *Laier,* N. D. Cal. S. D., 1943, 52 F. Supp. 392) There has been a denial of due process in this case.

ARGUMENT

ONE

The denial of the conscientious objector status by the appeal board was without basis in fact; consequently, the final I-A classification was arbitrary and capricious.

The undisputed documentary evidence in the file before the appeal board showed that the petitioner was conscientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious training and belief as one of Jehovah's Witnesses and (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulations providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

As a part of his draft board papers petitioner filed the *Watchtower* magazine of February 1, 1951. [R. 56] He incorporated and made a part of his file two articles. One is entitled "Why Jehovah's Witnesses Are Not Pacifists." The other is entitled "Pacifism and Conscientious Objection—Is There a Difference?" Nine copies of this magazine have been

filed with the Clerk of this Court to accompany the distribution of this brief. They are marked as APPENDIX A. (See also *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 370.) A summary of these two articles shall now be made.

I.

"WHY JEHOVAH'S WITNESSES ARE NOT PACIFISTS"

In 1950 Jehovah's Witnesses assembled in convention at Yankee Stadium, New York city. Ten thousand foreign delegates had difficulty in clearing immigration to attend the assembly because of the false charge that they were extreme pacifists. The American delegates unanimously passed a regret and protest—a million copies of which were distributed.

The definition of "pacifist" found in Webster's *Dictionary* is relied upon. That definition of pacifist does not fit a true Christian. Jehovah's Witnesses began with Abel. A long list of witnesses for Jehovah have records in theocratic warfare showing they were not pacifists. The exploits of Abraham, Moses, Joshua, Barak, Gideon, Jephthah, Samson, Samuel and David demonstrate this.

The fighting experiences of Nehemiah, Mordecai and Esther while in captivity in Babylon and Persia further prove Jehovah's Witnesses of old were not pacifists. The experiences of Daniel under King Darius the Mede and Nehemiah under Cyrus and Ahasuerus, the Persian kings, show they were not pacifists. The military exploits of all these famous witnesses for Jehovah were a part of theocratic warfare. However, such witnesses did not fight for Babylon, the Medes or the Persians. They fought under the direction of God for the theocratic nation of Israel. Since the fall of the Jewish nation and the advent of Christianity the warfare of his Christians has not extended to military weapons.

Because of this change Jehovah's Witnesses are, however, not pacifists. They are conscientious objectors to war and the "defense efforts" of Christendom and the rest of the world. The objections of Jehovah's Witnesses are based on God's Word, the Bible. Jehovah's Witnesses are neutral toward the wars between the nations. They do not campaign against the war efforts of the nations, and they do not oppose those who conscientiously participate in the war efforts.

Jehovah's Witnesses take the same neutral stand toward war as did Jesus. He commanded against the use of the sword. Jehovah's Witnesses, while neutral to war, are not pacifists engaged in resisting war or interfering with the wars between nations.

Jehovah's Witnesses do not oppose Jehovah's great war that will destroy the nations of the Devil's world at Armageddon. They proclaim this coming destructive warfare against the world. Christ Jesus will lead the invisible forces of Jehovah and bring about the destruction of the nations of this evil world as Jehovah's Field Marshal at Armageddon.

II.

"Pacifism and Conscientious Objection —Is There a Difference?"

Jehovah's Witnesses will have no part in the violent warfare of this world and will not participate in the armed forces of Jehovah at Armageddon. This great battle will be fought by the angelic forces of Jehovah, led by Christ Jesus. Jehovah's Witnesses, while declaring and preaching the battle of Armageddon, follow the rule laid down by Christ Jesus. That rule did away with the Mosaic law of retaliation. This is the philosophy of "eye for eye and tooth for tooth." Instead of this rule the modern-day Christians, Jehovah's Witnesses, follow the rule of love of God and love of neighbor. Christians do good to those who speak

and do evil against them. There is no retaliation by Jehovah's Witnesses. Killing a burglar who breaks in at night is justified. Killing a thief who breaks in by day is condemned.

The rule of love and of no retaliation stated in the sermon on the mount is only part of the basis of conscientious objection of Jehovah's Witnesses.

Jehovah's Witnesses are Scripturally authorized to defend themselves according to the law of the land. When attacked they can Scripturally resist attack by the use of force. They do not arm themselves or carry carnal weapons. They will not retreat when attacked at their homes or when at meetings of their church but will retreat when attacked on public property or on the property of others. In such situation they shake the dust off their feet and do not give what is holy to dogs or throw pearls before swine.

Jesus said: "Render therefore unto Caesar the things which are Ceasar's; and unto God the things that are God's." (Matthew 22:21) God and not "Caesar" is the giver of life. The life of a Christian is dedicated to God and can not be transferred to Caesar. The lives and service of Jehovah's Witnesses belong to God, and not to Caesar. No man can serve two masters says Jesus' sermon on the mount. The dedication of Jehovah's Witnesses to God is a relation to the "Supreme Being involving duties superior to those arising from any human relation." This is a quotation from the Selective Service Act of 1948. Jehovah's Witnesses take the position of the apostles of Jesus: "We must obey God as ruler rather than men."—Acts 5:29, *New World Translation.*

The words of Jesus about paying back to Caesar the things that are Caesar's were limited by Jesus to payment of taxes and were not extended by him to military service. This is emphasized by what Jesus told a representative of Caesar, Pilate. He said: "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up

to the Jews." (John 18:36, *New World Translation*) Jesus also stated that the world hates Jehovah's Witnesses because they are neutral.

Jehovah's Witnesses are minister-ambassadors. They occupy a neutrality and exempt status from military service as did the priests and Levites in the nation of Israel. Even theocratic warfare does not require a minister to war; but Jehovah God protects his ministers. This principle is followed by Jehovah's Witnesses in dealing with the warfare of modern-day nations.

The only weapons of warfare that Jehovah God permits his witnesses to use are spiritual weapons: oral words, printed words and the sword of the spirit, which is the word of God contained in the Bible. Jehovah's Witnesses are Christian soldiers enlisted in God's army and as such cannot desert his forces. They cannot break their agreement to keep ministering and preach the gospel. To do so would mean their death.

Jehovah's Witnesses are an "earth-wide brotherhood" society. It follows that there cannot be slaying of one Christian by another Christian. This spiritual brotherhood is another basis for the conscientious objections of Jehovah's Witnesses. This is only a partial statement of the conscientious objections of Jehovah's Witnesses; it is enough, however, to prove the consistent neutrality of Jehovah's Witnesses and their lack of pacifism.

Based upon the *Watchtower* magazine of February 1, 1951, the argument that immediately follows is here appropriate.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scripturally proper. Regardless of whether the service is voluntary or by capitulation to commands the situation is the same: the Christian minister of Jehovah thus gets

unscripturally involved in the affairs of the nations of this world. Petitioner believes that he who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Translation*) This he does by faithfully sticking to his post of duty as a minister of Jehovah. He does not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father: "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses do not entangle themselves in the affairs of this world, because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

Jehovah's Witnesses fight lawfully as such dedicated soldiers with all the legal instruments, such as the con-

stitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16) They fight with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10 : 3-5, *New World Translation, Weymouth.*

In addition to the legal instruments that such Christian soldiers use the great weapon that they wield among the nations of the earth is the "sword of the Spirit, which is the word of God." (Ephesians 6:17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. —Ephesians 6 : 10-13, *New World Translation.*

Since they are in the Lord's army of gospel preachers, they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow from the affairs of this world. They cannot be in two armies at the same time. Since they have been enlisted and serve in the Lord's army as his ministers they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit the Lord's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters

are covenant-breakers. "Covenant-breakers . . . are worthy of death."—Romans 1:31, 32.

The nations of this world cannot excuse the Lord's soldier from the penalty of death prescribed by Almighty God for deserters from his army. "Caesar," not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from the Lord's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but can not kill the soul; but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation.*

The law of God and the law of the land authorize a person to protect his home against crime or violence. Jehovah's Witnesses are justified in killing a person who breaks into their home if it is necessary to repel the assault. (Exodus 22:2) These are the only circumstances when the use of force or killing is authorized by the law of God. There are no other circumstances where the law of God authorizes killing.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Jehovah's Witnesses have conscientious objections, based on such training and belief, to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God that prohibit Jehovah's Witnesses from

bearing arms or joining the armed forces of the nations of this world.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that they were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*) Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or represent the armed forces of the nations of this world represented by "Caesar." Then, accordingly, they render unto God that which is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the armed forces of Caesar in international conflicts. They render unto Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

It has been held by many courts of appeals that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399 (1953), holding that if there is no contradiction of the documentary evidence showing exemption as a minister there is no basis in fact for the classification, also applies in cases involving claims for classification as conscientious objectors.—*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369, 371; *Pine* v. *United*

States, 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 804-805; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 439, 441; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 445, 446.

In *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 900, after quoting from *Dickinson* v. *United States,* 346 U. S. 389 (1953), the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government, which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329) said (212 F. 2d, p. 899): "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings with which the holding of the court below directly conflicts on this point are: *Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 692; *United States* v. *Pekarski,* 2d Cir., 1953, 207 F. 2d 930, 931; *Taffs* v. *United States,*

8th Cir., 1953, 1953, 208 F. 2d 329, 331-332; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 804-805; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368-369, 370-371; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 439, 441; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 445, 446. And these cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different, because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case in so far as the statements in the draft board record showing conscientious objection are concerned.

In the court below respondent placed emphasis upon the failure of Witmer to sign the Series I(B). Local Board Memorandum No. 41, issued by National Headquarters, Selective Service System, November 30, 1951, as amended August 15, 1952, provides in paragraph 2 as follows:

> "2. What *constitutes a claim of conscientious objection.*— A registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector."

It should also be remembered that Witmer actually prepared his own statement containing substantially the same language as appears in Series I(B). [R. 27]The court below

has held in *Berman* v. *Craig*, 207 F. 2d 888, 891, opinion by Judge Maris on November 27, 1953, that "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."

Great emphasis was placed on the fact that Witmer changed his position three times before the local board in respect to making his claim for classification. The Selective Service regulations do not require a registrant to base his claim upon any one particular claim. Section 1623.2 of the regulations gives the registrant the right to make, and places the duty upon the local board to consider, any of 16 different classifications. The local board must classify the registrant in the lowest classification for which he is qualified. Section 1625.1(b) requires the registrant to notify the local board in writing of "any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition."

A man may be a farmer, judge and a father. As a registrant he must file a classification questionnaire setting forth the truth as to his entire status. He must show the facts about his being a father. He must show the facts about his status as a judge. He must show the truth about his farming operations. The mere fact that a registrant may give the information about all this different status under the act does not mean that he has changed his position. He is merely telling the board all the facts. The registrant has only one hearing before the local board. He cannot allege one claim, then come back and make another, then come back and make a third and then have a hearing and personal appearance on each one. He must tell all the facts, and then his personal appearance requires the local board to consider *de novo* the entire case, including not only the farmer's classification but the claim for classification as a judge and as a father in the supposed case above stated. This illustration and analogy proves that

Witmer was not inconsistent when he stated to the board the truth about his being a minister, a farmer and a conscientious objector.—*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331.

It is submitted, therefore, that there is no basis in fact for the denial of the conscientious objector status by the appeal board.

TWO

The act and regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that willingness to work on a farm and produce food to assist in the war effort is basis in fact for the denial of the conscientious objector status.

Section 6(j) of the act (50 U. S. C. App. § 356(j), *supra,* p. 2) provides for the appropriate inquiry and hearing in the Department of Justice. The act and the regulations provide for the recommendation by the Department of Justice to the appeal board following the hearing before the hearing officer. (Section 1626.25 of the regulations, *supra,* p. 6) The act and the regulations, therefore, make the inquiry, the hearing and the recommendation of the Department of Justice to the appeal board a statutory and vital link in the chain of administrative proceedings. The consequence of this is that it is necessary that the proceedings in the Department of Justice be in accordance with law and that they do not conflict with and defy the law.

Petitioner submits that the Department of Justice misinterpreted Section 6(j) of the act. It is to be observed that Congress did not confine the conscientious objections to "war in any form" but extended it to direct participation. Congress did not imply that a conscientious objector who was not opposed to employment in defense work was not a conscientious objector. It is participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing can be found in the act or the regulations or in the legislative

history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he is willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the appeal board is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who has conscientious objections, based upon religious grounds, to participation in war in any form. Congress did not make the factors relied upon by the trial court and the local board in this case any basis in fact for the denial of the conscientious objector claim.—*United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443, 446; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d — ; *Franks* v. *United States*, 9th Cir., Oct. 4, 1954, — F. 2d — ; *Goetz* v. *United States*, 9th Cir., Oct. 14, 1954, — F. 2d — .

The opinions of the courts below are based on an unreasonable interpretation of Section 6(j) of the act extended to forfeit the status if the objector is willing to engage in "indirect participation." The proper interpretation of the act should limit consideration to participation in military service with the word "direct." If consideration of work that the objector is willing to do is not limited to direct participation but extends to indirect participation, then the conscientious objector can be denied his status unless he refuses to do anything in any way indirectly contributing to the war effort. In time of total war every civilian is indirectly geared to and participating in the war effort whether he likes it or not. The argument of the Government and the construction placed upon the act by

the court below completely nullify the provisions of the act that conscientious objectors do civilian work contributing to the war effort. Congress did not intend to be so unfair or unreasonable.

The holding of the court below is subversive of the intention of Congress. It ignores completely the criterion of opposition to participation in the armed forces. The Government injects the vague and indefinite dragnet of opposition to war into the statute, nullifying completely the plain purpose of Congress in passing the law.

In making the law Congress was dealing only with raising an army. Exemption from becoming a soldier was given to many different classes of registrants who contributed to the war effort. The performance of a certain type of work outside the army deferred most of the ones excused from training and service. Pursuit of the vocation of minister is an outstanding exemption. Farming, essential work in the national defense industry and service to the state or federal governments in different capacities are the most common exemptions. The status of severe hardship and conscientious objection are other deferments not based on occupation or work.

The deferred status of hardship or conscientious objection does not at all depend on the type of work that the registrant is willing to perform, whether in a defense plant or not. The statute nowhere makes the kind of work done by a registrant claiming deferment as a conscientious objector before induction an element to consider. The only time that the type of work performed or willing to be performed by a conscientious objector is material (and then it is after induction, and not work before induction that is involved) is when it is shown that he performs combatant service or is willing to perform combatant service. Then and only then can it be said that the service performed or willing to be performed by the registrant disproves conscientious objection to service.

It is true that Congress classified the type of work that a conscientious objector can be drafted to do. It is anything that contributes to the health, safety and welfare of the nation. So long as it is of a civilian nature it must be done when ordered by the draft board to be done by the conscientious objector under the act. What is there in the act or the regulations to prevent a draft board from ordering a conscientious objector to do work in a war plant? Nothing! Concerning the similar provision for work by conscientious objectors under the 1940 act it is said ". . . that the Act did not even guarantee that the objector would not be assigned to do work connected with the war effort." (Sibley and Jacob, *Conscription of Conscience,* Cornell University Press, Ithaca, New York, 1950, p. 50) Since a conscientious objector could be ordered to do work of a civilian nature contributing to the national welfare in a defense plant, then how can the Government now say that because a man says he is willing to do work in a war plant he is not a conscientious objector? The argument of the Government is incongruous and leads to unreasonable and harsh results.

Congress has required direct and indirect participation by conscientious objectors by the law. This is required of the two classes of conscientious objectors. One classified in I-A-O as a conscientious objector must go into the army, wear a uniform and directly participate by performing all kinds of military service except combat duty. The other is required to participate indirectly by doing civilian work contributing to the national health, safety and welfare. These are the only words of Congress on the type of work to be done by conscientious objectors. Congress did not go outside the boundaries of the law and legislate on the type of work done by the conscientious objector before he is inducted into service. It is therefore entirely irrelevant, immaterial and improper for the courts below to amend the law by now doing what Congress has not done. It is for Congress to take the step the court has taken. Since Con-

gress has not taken the first step, the courts below cannot step in and take the leap Congress has not permitted them to take.—*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446.

The holding of the courts below is inconsistent with the act itself. Section 6(j) of the act (*supra,* p. 2) provides for the classification as conscientious objectors of persons who are willing to go into the armed forces and do non-combatant military service. The argument that one who is willing to contribute something to the war effort is not a conscientious objector is inconsistent with the act itself. This Court rejected the specious and factitious position of the Government and the courts below in *Girouard* v. *United States,* 328 U. S. 61 (1946), 68-69. Modern-day total war is designed to be implemented by a conscription system that gears the total population for contribution either directly or indirectly to the war effort of the nation. Since the very act that provides for the conscientious objector classification also provides for the conscientious objector to contribute something toward the war effort, the argument of the Government and the courts below flies in the teeth of the act.

Petitioner submits that the Government and the courts below have misinterpretated Section 6(j) of the act (*supra,* p. 2). It is to be observed that Congress never extended conscientious objections to mere objection to "war in any form." Congress did not say that a conscientious objector who was not opposed to employment in defense work was not a conscientious objector. It is direct *participation* in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form, even though

he was willing to contribute indirectly by defense work as a means of employment. If the unreasonable interpretation placed upon the act by the courts below is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

It is entirely irrelevant and immaterial to hold that there was basis in fact because Witmer was willing to assist in the war effort by farming. This was not an element to consider and in any event it was no basis in fact, according to the law, for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report. The law does not authorize the Department of Justice to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.—*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d — ; *Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d — ; *United States* v. *Alvies,* N. D. Cal. S. D., 1953, 112 F. Supp. 618, 620, 623-624; *United States* v. *Graham,* W. D. Ky., 1952, 109 F. Supp. 377, 378; *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 130-131; *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399 (1953); *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 369, 371; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 805; *Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 823; *Lowe* v. *United States,* 8th Cir., 1954, 210 F. 2d 823; *United States* v. *Lowman,* W. D. N. Y., 1954, 117 F. Supp. 595, 598; *United States* v. *Benzing,* W. D. N. Y., 1954, 117 F. Supp. 598.

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work done or agreed to be done by the conscientious objector is in the armed forces.

In passing the Selective Service Act of 1948 (as amended) the Congress of the United States provides for two kinds of conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or bear weapons. This type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform, even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted, also, that the conscientious objector to both combatant and noncombatant military service ought not to be denied his conscientious objector classification because of the kind of work he is doing outside the armed services. The law disqualifies no one on such ground. It seems that a reasonable interpretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve combatant or noncombatant military service.

That Witmer may have been willing to work on a farm does not in any way constitute basis in fact for the I-A classification. That classification still remains arbitrary and capricious. There is nothing in the act or the regulations that authorizes the draft board to order a man to do combatant military service because he is willing to work on a farm.—*Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d — ; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *Goetz* v. *United States,* 9th Cir., Oct. 14, 1954, — F. 2d — ; *Franks* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d — .

During the Civil War the provost marshal general was authorized to grant special benefits to noncombatants under Section 17 of the act (approved February 24, 1864). President Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 42-43, Washington, Government Printing Office, 1950.

The act and the regulations are specific as to what constitutes a conscientious objector to both combatant and noncombatant military service. Nowhere in the act or in the regulations is there any basis for the assertion that performance of work on a farm allows the draft board to classify a registrant as a combatant soldier. As long as a registrant can prove that he has conscientious objections to military service, he is entitled to the conscientious objector classification. This is true regardless of what sort of work he does. Whether he contributes directly or indirectly to the war effort is entirely immaterial as long as the work is not military service.

If the position be upheld that one who performs work that directly contributes to, and indirectly participates in, the war effort is not entitled to the conscientious objector status, then it will become impossible for any conscientious objector ever to get the classification. Even a person who pays income tax or other tax to the federal government is participating both directly and indirectly in the war effort. The money that he pays in taxes is used for the financing

of the military machine of this nation. Congress did not intend to forfeit the conscientious objections on such a vague and indefinite basis. Congress defined a conscientious objector. As long as a person meets that definition and fits the statute and regulations, the fact that he might do work of any sort is wholly irrelevant and immaterial.

The argument of the Government in defiance of the intent of Congress by a strange and unreasonable interpretation of the act now would force all conscientious objectors to go on a sit-down strike and do absolutely nothing, either directly or indirectly, that might contribute to the war effort in order to preserve the freedom from participation in the armed forces granted to them by Congress.

The recommendation of the Department of Justice here, therefore, that Witmer should be ordered to do combatant military service in the armed forces because he had worked on a farm is illegal, arbitrary, capricious and contrary to the act.

THREE

The local board deprived petitioner of his rights guaranteed by Section 1624.2 of the Selective Service Regulations by considering the case as out of its hands and by refusing to reopen the case and reclassify petitioner upon his personal appearance.

Petitioner was told by the local board that because he had appealed his case no action would be taken on his personal appearance. [R. 4-10, 13] it was the policy of the board not to reopen and reclassify any registrant on personal appearance, as required by law, when no new evidence was presented. [R. 4-7, 10] This process followed by the local board was in defiance of the Selective Service Regulations.—32 C. F. R. § 1624.2(b) and (c) (*supra*, p. 5)

The holding of the court below on this question ignores completely the importance of the maintenance of procedural due process of law in Selective Service cases. It should be

remembered that the scope of review in Selective Service cases as far as the classification is concerned is limited and restricted. (*Estep* v. *United States,* 327 U. S. 114, 121-122 (1946)) The rule of administrative law is that in cases where the review is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency.—See *N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446.

It has been uniformly held that for the final order to report for induction to be valid in Selective Service cases it must appear that the local board has strictly complied with the procedural requirements of due process of law. —*Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; Ex parte *Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, 147-148; *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

In *United States* v. *Hufford,* M. D. Pa., 1952, 103 F. Supp. 859, 861, the court said:

> "If the board did not fully and fairly comply with the provisions of the Act and the applicable regulations, the registrant was under no duty to comply with the order."

The effort on the part of the trial court to simulate this case to *Martin* v. *United States,* 4th Cir., 1951, 190 F. 2d 775, certiorari denied 342 U. S. 872 (1951), and to distinguish it from the holding in *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455, proceeds on a fundamentally erroneous basis. The confusion demonstrated by the trial court may perhaps fog up the view of the law so that the Court will miss the point unless there is a clarification.

The entire basis of the holding below can be briefly stated. It is: Witmer had notice of what took place upon the occasion of the personal appearance. Because he had actual notice of the proceedings there was a waiver of

the violations of the law by the local board and Witmer cannot now complain about these violations.

The undisputed evidence shows that the local board defiantly refused to reopen the case and consider it entirely anew. The local board merely stated that the new evidence did not show Witmer was entitled to the ministerial exemption. The board then refused to reopen, declaring that the original classification stood. This was not a *de novo* consideration of the case. Admittedly there is no evidence in the record before this Court that the case was reopened as required by Section 1624.2(b) and (c) of the regulations. The record shows to the contrary. It cannot be argued that because the board considered the IV-D claim there was a *de novo* consideration. Nowhere in the record does it appear that the local board reopened the entire case. Nowhere does it appear that on the personal appearance the local board considered the conscientious objector form. Nowhere in the record does it appear that the local board considered the farmer's classification. The only claim that was mentioned was the minister's claim, but even then the very memorandum in which it is mentioned shows that the board did not reopen the old classification, as it was required to do. It merely ordered the old original classification to stand without any reclassification as required by Section 1624.2(c) of the regulations.

It is obvious that the local board defiantly violated Section 1624.2(c), refused to conduct a *de novo* hearing upon the personal appearance and refused to consider all the claims for classification and reclassify Witmer, "in the same manner as if he had never before been classified," as required by Section 1624.2(c).

The trial court merely argued that because Witmer was given actual notice of this procedural violation of his rights by the local board this was equivalent to the legal notice of legal procedure required by Section 1624.2(c). Actual notice of the illegal refusal to reopen the case and reclassify Witmer was not notice of reclassification on per-

sonal appearance, required by Section 1624.2(d). That section of the regulations says that the board shall mail the registrant notice of classification. Since there was no reclassification upon personal appearance the giving of actual notice of the determination of the local board not to reopen cannot be argued or found to be "Notice of Classification" required by Section 1624.2(d).

In order for the notice of action by the local board to be good and legal the action taken by the local board upon personal appearance must be legal action itself. There must be a reopening of the classification and a reclassification as required by Section 1624.2(c) of the regulations. Illegal action and notice of such illegal action are not equivalent to the legal action required by the regulations and notice of such legal action.

Actual notice, even though not in writing, of proper legal action makes harmless the failure to give written notice required by the regulations. (*Martin* v. *United States,* 4th Cir., 1951, 190 F. 2d 775) But where there is illegal action the actual notice thereof does not make the illegal action legal or validate the invalid proceedings.

If the holdings below are to be approved, then it will be the end of procedural due process of law. A tribunal could deny procedural due process upon a hearing and then notify a party of such illegal denial. According to the Government's argument the giving of actual notice of such denial of procedural due process constitutes a waiver of it. This extreme position taken by the Government the law of the land rejects. The position of the Government in this case is subversive of the maintenance of due process of law and standards of strict compliance with the procedural requirements of law.

The position of the petitioner in answer to the holding made by the trial court on this point can best be proved by an illustration. Suppose in a hypothetical case involving judicial proceedings the law made mandatory the granting of a new trial whenever requested by the losing party. This

unusual supposition for judicial proceedings is identically the same as that provided for in Section 1624.2(c) of the regulations in effect on January 22, 1951. In such a hypothetical case the failure and refusal of the court to grant and conduct a new trial made mandatory in the hypothetical case would be a denial of due process of law. Purely because the court in the hypothetical case notified the litigant that there would be no *de novo* hearing on the new trial would not cure the error in failing to conduct a new trial properly, enter a new judgment and give notice of entry thereof. The same violation of procedural due process is apparent here in this case.

The testimony given by the clerk, which is relied upon by the trial court, supports the undeniable contention that the local board refused to reopen the case. The clerk said that the board told Witmer that his case was out of their hands because he had taken an appeal. This conclusively shows that the board refused to consider the case entirely *de novo* as required by the regulations. [R. 4, 5-7, 10]

The Government's reliance upon other oral testimony given by the clerk does not support the position taken by the Government. Nowhere does the clerk testify that the board reopened and reconsidered the case on the personal appearance. Any argument that the Government makes that the testimony of the clerk of the local board can overcome, alter, change or add to the memorandum by the local board upon the personal appearance should be rejected. The court below in *United States* v. *Hufford,* M. D. Pa., 1952, 103 F. Supp. 859, 862, held that the testimony of a clerk could not be relied upon to add to or take from any written local board records.

Extensive argument was made by the Government in the court below that because the local board told Witmer that the evidence he offered to them on personal appearance "was not sufficient to warrant a IV-D classification" this was sufficient and equivalent to a reopening and reclassification upon personal appearance. If this stood alone,

then perhaps something could be said for it in favor of the Government. But the other records indicate to the contrary. The other records show that there was no *de novo* consideration. Additionally, the most that can be said for this entry in the memorandum is that the local board on personal appearance considered only the one claim, namely, the ministerial exemption. It shows that the board did not consider the farmer's classification and the conscientious objector's classification upon personal appearance. The failure of the local board to consider the conscientious objector form upon personal appearance is conclusive proof that there was failure to reopen and reconsider the case as required by Section 1624.2(c).—See *Knox* v. *United States,* 9th Cir., 1952, 200 F. 2d 398, 401-402.

The Government relies upon *Martin* v. *United States,* 4th Cir., 1951, 190 F. 2d 775, and *Atkins* v. *United States,* 10th Cir., 1953, 204 F. 2d 269. The facts in both those cases show an entirely different situation from the facts that exist in this case on the personal appearance. In both those cases the only claim made by the registrant was the ministerial claim. No conscientious objector claim was made. There was no other claim for classification made. When the boards considered only the ministerial claim in the *Martin* and *Atkins* cases they considered the entire case. Here, however, there was more involved in the case than the ministerial claim. It was the duty and responsibility of the board to pass upon the conscientious objector claim and the farmer claim. Neither of these claims was passed upon or considered. Moreover, the *Martin* and *Atkins* cases are distinguishable for other reasons. It appears from the opinions of the courts in both those decisions that each local board did actually reopen the case and consider the classification entirely anew. Martin was actually reclassified on the personal appearance and placed in Class I-A. Atkins, while not reclassified, was notified that his claim for exemption as a minister had been denied and that the old classification would be continued. Therefore, there was an actual

reopening of the cases by the local boards. But such was not done in this case. Therefore, the doctrine of *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455, 458-459, applies here and should be enforced rather than the rule of *Martin* v. *United States*, 4th Cir., 1951, 190 F. 2d 775.

There is a plain distinction apparent on the face of the *Stiles* and *Martin* opinions. The *Martin* opinion shows that the registrant was actually reclassified *de novo* and on personal appearance the local board reclassified him I-A. The memorandum of the local board quoted from in the opinion of Judge Parker shows that the "registrant is continued under Class I-A." The board there did not refuse to take any action as the record showed in the *Stiles* case. In the *Stiles* case (3rd Cir., 1948, 169 F. 2d 455, 456-457) the opinion shows that after the registrant appealed on January 21, which was following his letter requesting a personal appearance on January 17, a hearing was held on February 4. Stiles appeared and gave evidence. The *Stiles* opinion goes on to point out that following the personal appearance the board did not again classify him or send another notice but "on the next day sent his file to the board of appeal which classified him I-A."

The single narrow question involved in the *Stiles* decision was "whether under the Selective Service Regulations a local board is required to classify a registrant anew after his personal appearance before the board even though he presents no new information to the board when he appears before it." This language is taken from the *Stiles* opinion, 169 F. 2d, page 457. The court below went on to hold that "the furnishing of new information" is not made "a condition precedent to such classification anew and it thus appears that it is to be done after reconsideration of the information already in the file in the light of the registrant's oral discussion of it and of his claim for reclassification even though he has furnished no new information." —169 F. 2d, p. 458.

The facts in the case at bar are also distinguishable from the *Martin* facts (4th Cir., 1951, 190 F. 2d 775) while the facts in the *Stiles* case are identical to the facts in this case. In the case at bar and in the *Stiles* case there was no *de novo* classification as there was in the *Martin* case. There was no continuance of classification ordered. The board in the *Stiles* case, as well as the board in this case, considered the case to be *out of its hands* because of the prior notice of appeal. The files in both cases were sent to the boards of appeal without a new I-A classification by the local board, which was given upon the personal appearance in the *Martin* case. This distinction was apparently recognized by this Court in the denial of the petition for writ of certiorari in the *Martin* case (342 U. S. 872) that was based on the ground that there existed a conflict.—See also *United States* v. *Fry,* 2d Cir., 1953, 203 F. 2d 638, 640.

Under the decision in the *Martin* case the failure to mail a classification card was held to be harmless error because of the actual notice of reclassification given to the appellant in that case. There was oral notice also given in this case. But the notice was not of a reclassification. Petitioner was notified that no action was going to be taken on this classification. This was not a notice of reclassification contemplated by the regulations and the opinion of the court below in the *Stiles* case. It is the lack of notice of *reclassification* that aggravates the error of the board in failing to consider the case *de novo.* Notice of any other thing by the local board is not sufficient. The local board was required by the regulations to give a certain kind of notice. It was notice of reclassification. No such notice was given. The notice of no action taken did not comply with the regulations. Until there was a new classification and a notice in writing of the new classification the local board had no authority to order the appellant to report for induction. —*United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 796-797.

In the *Stiles* case the court below said:

> "Moreover the order for his induction was in direct violation of § 625.3 since it was issued after he had requested a personal appearance but before notice of his classification anew had been mailed to him as required by § 625.2 (d). It follows that the induction order was invalid and that Stiles, having exhausted his administrative remedies, was entitled to set up its invalidity in his defense. His motion for a judgment of acquittal should, therefore, have been granted."—169 F. 2d, page 459.

The action of the local board is illegal, because when it entertained petitioner's application for a personal appearance as a matter of law the entire proceedings were stayed and nullified until such time as the petitioner had received a classification card. The local board not having mailed him a reclassification card following his personal appearance, the entire action taken by the local board and the board of appeal was *ultra vires* and contrary to the regulations. —*United States* v. *Graham, supra.*

It is said that since the petitioner had already filed a notice of appeal it was unnecessary to give him a new notice of classification following his personal appearance and, accordingly, the oral notice given by the local board upon the occasion of the personal appearance was adequate and sufficient.

The filing of a double request—for a personal appearance and appeal—has caused confusion for some time. Under the present regulations the Director of Selective Service has given some help. The boards are directed as to how to deal with this situation. In Local Board Memorandum No. 52, issued January 14, 1953, among other things, he says:

> *"2. When personal appearance is a procedural right.*—. . . (d) Frequently, after classification by the local board and within 10 days after the mail-

> ing of the Notice of Classification (SSS Form No. 110), registrants will request a personal appearance and also appeal to the appeal board. In such a case, the fact that an appeal has also been taken does not deprive the registrant of his procedural right of personal appearance. The local board must give the registrant an opportunity to appear. If the local board determines not to reopen the registrant's classification after the personal appearance, the registrant's file must be forwarded to the appeal board without further action on the part of the registrant since he has already appealed from that classification. If the local board reclassifies the registrant after the personal appearance, his file need not be forwarded to the appeal board unless he thereafter appeals from his new classification."

In Paragraph 2(b) of the above local board memorandum General Hershey says further:

> " . . . It is important that the required notice and advices be mailed promptly by the local board since the right to appeal may continue indefinitely unless they are mailed."

The *de novo* consideration and the *de novo* classification are jurisdictional. The fact that the registrant may have notice of the violation of the regulations that makes "its action . . . lawless and beyond its jurisdiction," as stated in *Estep* v. *United States*, 327 U. S. 114, 121 (1946), does not cure the want of jurisdiction any more than notice of the refusal to "reopen on the written request of the State Director a registrant's classification," which was stated in the *Estep* opinion to make the determination lawless, would cure the want of jurisdiction in such a situation. The mailing of the classification card following personal appearance and the new classification are equivalent to the requirement of the entry of a written judgment in a court of law. No

lawyer or judge would have the audacity to contend that an oral opinion expressed by a judge from the bench constituted the written judgment of the court or the docket entries that make up a record in a case. This situation is analogous here. No amount of oral notice cures the violation of the regulations by the local board.—See *United States* v. *Graham*, 108 F. Supp. 794, 797.

As to the argument that failure to give written notice is harmless, the Court is referred to the language in *Smith* v. *United States*. 4th Cir., 1946, 157 F. 2d 176, 182. There the local board failed to reduce to writing and prepare a written summary of the facts considered by the local board in making its classification. The Government argued that the failure to comply with the regulations was harmless error in view of the fact that the defendant had the right to make a written statement or summary himself upon the appeal to the appeal board.—See also *Niznik* v. *United States.*, 6th Cir., 1949, 173 F. 2d 328.

The error here is grievous and fundamental. It prejudiced the petitioner's rights. It is unlike the harmless error in the *Martin* case. There the court held that in a case where there was a full compliance with the personal appearance regulation (except for the giving of written notice of the new classification) it was harmless because Martin was told by the board when he was called back five minutes after the new classification what it was. Also, later the clerk of the board read the memorandum of the action of the board to him. We have no situation of a substantial compliance with the board here. Here was a rank and complete omission to follow the necessary steps required by the Selective Service Regulations. What the court below said in the last paragraph of its opinion in *United States* v. *Zieber*, 1947, 161 F. 2d 90, 93, is still the law today and applies here.

In *United States* v. *Strebel*, D. Kan., 1952, 103 F. Supp. 628, 631, the court refused to extend the doctrine of the *Martin* case and chose to follow the *Stiles* case. There no

new classification notice was mailed after the board decided to let the original classification "drift along." This is the situation here.—See also *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794.

The United States District Court for the Eastern District of Pennsylvania in Ex parte *Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, held that a liberal and scrutinous review of draft board classifications is demanded under the 1948 and 1951 draft acts and that the courts are not required to follow the stricter view adhered to under the 1940 act.

In a consideration of the Selective Service Regulations the Court ought to be careful not to confuse the regulations in force at the time of the progress of the petitioner's case through the local board with the regulations amended at a later date. This danger was called to the attention of the trial court and he avoided the pitfall but fell into the well on a decision of the case on other points. See the transcript of the testimony for the effect of the change in the amendments and the inapplicability of the new regulations.

Under the new regulations it is not necessary to reclassify unless new and additional evidence, sufficient to justify a change in classification is given. If the new evidence is sufficient, then the classification is reopened and the registrant is then classified anew. There must, however, even under the new regulations, be a written notice of the action taken by the local board. See Section 1624.2(c) and (d) as amended by Executive Order of the President No. 10,292 on September 25, 1951, which was after the date of the personal appearance of the petitioner in this case.

The trial court made a point about the petitioner's making a double-barreled complaint of the classification by the local board in that he requested an appeal and a personal appearance in the same letter. This was the same situation in the *Stiles* case. Before the personal appearance Stiles had requested both a personal appearance and an appeal.

A cursory consideration of the facts might lead one to the conclusion that the board was confused by the action.

This is a common procedure followed by registrants. (See Local Board Memorandum No. 52, issued January 14, 1953, *supra*, p. 56) The practice is due to the printed notice appearing on the original classification card mailed to all registrants. (SSS Form No. 110) The notice reads:

> "Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board. Within the same 10-day period you may file a written request for personal appearance before the local board."

The above form has in the same paragraph a notice that says if the request is made the time to appeal is extended ten days from the mailing of the new notice following personal appearance. Section 1606.51 (of which the Court can take judicial notice) makes the form a part of the Selective Service Regulations.

It is seen that if any confusion was caused the board, it was set in motion by the provisions of the Form No. 110 used by the board. The petitioner, being a layman and unlearned in the law, cannot be judged on the basis that he was skilled in the knowledge of the regulations. He could have gotten by with a request for personal appearance but this was not plainly called to his attention on the card. The language of the card is ambiguous. A registrant reading the words would very easily take the two courses of making a dual request in order to play safe and not lose his rights. In any event the taking of the appeal simultaneously with requesting the personal appearance does not forfeit the rights of personal appearance. The fact that it was granted put the duty on the board of proceeding as though he had not mailed the notice of appeal.—See Local Board Memorandum No. 52, issued January 14, 1953, *supra*, p. 56.

The undisputed evidence shows that the board considered that the case was out of its hands upon the personal appearance. [R. 4, 5-7, 10] The hearing was a sham and a

shell because of his misinterpretation of the law. [R. 4, 5, 6-7, 8, 10, 13] If they considered and honored his request to the point of notifying him to appear for a personal appearance it was their duty to consider his arguments, his statements and his evidence. The rejection of these because the case was out of the hands of the board constituted a denial of a full and fair hearing.

There is an opinion of the court below directly in point on this question. It is *United States* v. *Zieber,* 1947, 161 F. 2d 90.—See also *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 356-358.

The right of a full and fair hearing is guaranteed by the regulations. The rights of the registrant upon a personal appearance are explicitly set forth in Section 1624.2(b).

It is obvious that the purpose of the regulations was to afford the registrant a full and fair hearing. The right to a personal appearance is an important one. The petitioner in this case, as a registrant, was entitled to be heard in person. It is fundamental that a personal appearance before a tribunal deciding any matter at issue is absolutely essential to insure justice and proper administration of law. In fact, the matter of personal appearance is recognized by the judiciary as being an indispensable factor of equal justice under law in the trial courts. It is fundamental that the appellate courts always yield to the finding of the trial court or jury upon issues of fact, because the trial court is in a better position to judge the matter that is at hand than the appellate court, inasmuch as the trial court has the advantage of the personal appearance of the litigants and witnesses. Indeed it would be a rank departure from due process of law were a trial court to refuse to permit parties or witnesses to make a personal appearance before the court. It is the purpose of the law to insure to litigants the right of personal appearance before tribunals, judicial or administrative.

The purpose of the regulations providing for personal appearance was to guarantee the rights of registrants to

procedural due process of law and to a full and fair hearing. These regulations cannot be circumscribed by arbitrary actions or wanton disregard for the rights of registrants or a mere desire to be free of a vexatious problem and to pass it on to a higher tribunal.

It certainly will be conceded that in judicial proceedings there would be a violation of procedural due process were the trial judge to deny the right of the litigants to appear personally and to force them to submit their case upon affidavits. The right to such a personal appearance would be defeated and frustrated in such an instance. While there is no constitutional guarantee of the right of a personal appearance before an administrative tribunal, if the regulations provide for the right of a personal appearance before such tribunal the personal appearance cannot be denied. If it is refused, then that constitutes a violation of procedural due process.

In this case the action of the local board was tantamount to a denial of the right of a personal appearance. The local board illegally regarded that the petitioner had appealed his case to the appeal board. The personal appearance before the local board was a hollow formality. Concededly the local board failed to consider the evidence of the petitioner. This was not a hearing upon a personal appearance of the type required by law. (*Bejelis* v. *United States*, 6th Cir., 1953, 206 F. 2d 354, 356, 358) "If one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."—*Morgan* v. *United States*, 298 U. S. 468, 480-481 (1936).

The local board's action in arbitrarily and capriciously refusing to give petitioner a full and fair hearing comes squarely within the statements allowing judicial review of draft board determinations in Ex parte *Stanziale*, 3rd Cir., 1943, 138 F. 2d 312.

In *Estep* v. *United States*, 327 U. S. 114 (1946), the Supreme Court held that draft board determinations and rul-

ings were final only when they were made in conformity with the law and the regulations. The Court mentioned a few of the violations of the rights of registrants that would constitute a violation of procedural due process. The Court then added: "In all such cases its action would be lawless and beyond its jurisdiction."—327 U. S., page 121.

In *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 93, the Government contended that honest, good-faith mistakes of a draft board in the denial of procedural due process constituted harmless error. This Court rejected this argument.

This regulation was considered by the United States District Court for the Southern District of New York in *United States* v. *Romano,* 1952, 103 F. Supp. 597.

In *United States* v. *Peterson,* N. D. Cal. S. D., 1944, 53 F. Supp. 760, the defendant requested a personal appearance. There, as here, it was granted. There the defendant appeared and his case was heard while he sat in an anteroom. In that case the hearing was denied completely in the presence of the defendant when he appeared.—See also *United States* v. *Laier,* N. D. Cal. S. D., 1943, 52 F. Supp. 392.

It is plain, therefore, that the local board did not carry out the burden placed upon it by Section 1624.2(b) and (c) of the regulations. The board did not consider the case *de novo* but refused to reopen the case and reclassify petitioner, because he did not offer any new evidence. (*United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455) This deprived petitioner of his rights to procedural due process of law upon personal appearance.

CONCLUSION

It is submitted that this Court should hold that the draft board order made the basis of the prosecution is void. The reasons are (1) there was no basis in fact for the denial of the conscientious objector status, (2) the recommendation by the Department of Justice that willingness to assist in the war effort by working on a farm was basis

for the denial of the conscientious objector status and (3) the local board denied petitioner his rights guaranteed by Section 1624.2(b) and (c) of the Selective Service Regulations. Therefore, the judgment of the court below should be reversed and this case remanded to the district court with directions to enter a judgment of acquittal.

Respectfully submitted,

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